



U.S. Department of Justice

Federal Bureau of Investigation

*CALEA Implementation Section
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Mr. Albert Gidari
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Dear Al:

Thank you for your letter dated March 28, 1998, regarding questions you have interpreting the Federal Bureau of Investigation's (FBI) Final Notice of Capacity, (63 FR 12217). As you know, the Final Notice of Capacity was promulgated under the rulemaking provisions of the Administrative Procedure Act, 5 U.S.C. § 553. In accordance with the requirements of section 553, written comments were sought from interested parties and were considered by the FBI in crafting its Final Notice of Capacity. As a result, the answers to the questions raised in your letter can be found in the Notice itself, as explained more fully below. Further, specific portions of your letter (i.e., Payment for Delivery of Capacity and Reimbursement Eligibility) have been addressed in the Government's Final Cost Recovery Rules (62 FR 13307).

Request No. 1 - Calculating Capacity

The Final Notice of Capacity, in adherence to section 104 of CALEA, lists the actual and maximum number of interceptions that law enforcement agencies authorized to conduct electronic surveillance may conduct three years after the issuance of the Final Notice of Capacity. Section 104 of CALEA states that the "Attorney General shall . . . provide . . . notice of the actual number of communication interceptions, pen registers, and trap and trace devices" Likewise, section 104 of CALEA states that the "Attorney General shall . . . provide . . . notice of the maximum number of communication interceptions, pen registers, and trap and trace devices" The Department of Justice satisfied the requirement of the legislation to publish an estimate of the actual and maximum number of communication interceptions, pen registers, and trap and trace devices law enforcement may conduct.

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In your letter, you state that “CTIA disagrees with the Department’s position in the Final Capacity Notice that one interception actually may require many content channels, depending on the features and services used by a target.” This is due to CTIA’s convention of identifying what exactly constitutes an “interception.” The Department, however, followed the language in the legislation which mandates that a Notice of Capacity provide notice of the actual and maximum **number** of communication interceptions, pen registers, and trap and trace devices. Furthermore, in an effort to address similar comments made by the industry in response to the Department’s Second Notice of Capacity, the Final Notice of Capacity includes specific examples (63 FR 12231-12232) that illustrate how a carrier, based on its solution of choice, may satisfy the requirement for all of the call-content and call-identifying information afforded to law enforcement under CALEA and the underlying electronic surveillance statutes.

The Department recognizes a carrier’s obligation to submit a carrier statement in compliance with section 104(d) of CALEA, and the reimbursement implications of not submitting a carrier statement. If there is any question, on a carrier’s behalf, as to whether a carrier’s equipment can accommodate the capacity requirements, the carrier may refer to the Final Notice of Capacity’s (Section V.D.) illustrative examples depicting possible delivery mechanisms of the capacity requirements to law enforcement. Furthermore, the Department takes the opportunity in Section VI.A. of the Notice to recognize the importance of a carrier’s submission of a carrier statement when it does not have the ability to meet its capacity requirement.

It is important to note that CALEA does not mandate that the Attorney General go beyond providing notice of an estimate of the number of communication interceptions, pen registers, and trap and trace devices. Furthermore, the Final Notice of Capacity neither requires a carrier to “calculate” or intimate its capacity requirement. However, the Department does agree with the last point of this request that the Department expects that “. . . carriers will understand that actual **delivery** of capacity **may** require more content channels than the actual or maximum capacity numbers set forth in the Appendices of the Final Capacity Notice.” (emphasis added) Section V.D. of the Final Notice of Capacity (63 FR 12232) recognizes that the delivery of capacity will vary based on the solution(s) chosen by an individual carrier.

Request No. 2 - Payment for Delivery of Capacity

The Department agrees with CTIA that channels and ports are a cost of capacity. Section II.E. of the Final Notice of Capacity states that the estimated cost of capacity “. . . is based on the following criteria: (a) each intercept would require the necessary hardware to provide law enforcement with two channels, (b) the equipment used to meet the capacity requirements would be dedicated solely for law enforcement

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use” (63 FR 12220). However, the Department does not agree with CTIA’s definition of the new term “delivery capacity.” This term is neither defined nor used in either CALEA or the Final Notice of Capacity. Furthermore, the Department does not agree with CTIA’s interpretation that “any equipment or facilities associated with delivery capacity will be reimbursed by the Department.” Equipment and facilities associated with the delivery of communications content and/or call-identifying information for which a carrier has been reimbursed under 18 U.S.C. § 2518(4) are not reimbursable under CALEA. Carrier cost of the delivery of communications content and/or call-identifying information to law enforcement can be recouped by service charges to the law enforcement agency effecting the lawfully authorized electronic surveillance court order. The Department does not agree with CTIA’s interpretation that the Department should reimburse carriers for “delivery capacity.” Under CTIA’s interpretation, the industry would stop incorporating its cost of equipment and facilities used for the delivery of call-content and call-identifying information to law enforcement.

Request No. 3 - New Entrants

The third request of your letter deals exclusively with new entrants. It is important to note *any* carrier that installs or deploys equipment in order to provide service after 180 days after the publication of the Final Notice of Capacity has to meet the actual capacity requirement at its expense. (It is similarly important to note that the capacity requirements are effective for *all* carriers three years after the publication of the Final Notice of Capacity, March 12, 2001.)

New facilities-based entrants (or any carrier that installs or deploys equipment in order to provide service after 180 days after the publication of the Final Notice of Capacity) are subject to the capacity requirements of the geographic area in which they provide service. As stated in the Final Notice of Capacity, because these carriers will not be reimbursed under sections 104(d) and 104(e), the capacity requirements can be applied and distributed at the discretion of the carrier. Section V.C. of the Final Notice of Capacity states “[F]rom a law enforcement perspective, the fundamental concern is that interception capacity must be available as needed. Hence, as long as carriers can accommodate the interception capacity required when needed, the capacity could be addressed and applied as either reserved or deployed” (63 FR 12232).

The Final Notice of Capacity does not distinguish between interceptions of the content of communications and call-identifying information on a carrier-by-carrier basis. However, the Final Notice of Capacity does offer guidance to those carriers offering service where the estimated actual and maximum capacity requirements are somewhat sizable and who choose a switch-based solution, by providing a high-end capacity ceiling that would be expected from any one switch (63 FR 12231-12232).

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Request No. 4 - Meeting Capacity

The fourth request of your letter states “. . . Section 104 of CALEA requires carriers to advise the FBI via a carrier statement whether, based on the Final Capacity Notice, it can accommodate simultaneously the *number of interceptions* specified in the Notice” (emphasis added). With respect to this item, I draw your attention to the Final Notice of Capacity which states “. . . the estimates should not be interpreted as constituting the number of interceptions that law enforcement intends to, or is planning to, conduct. The number of interceptions that will actually be needed will be determined by active authorized law enforcement investigations which require interception efforts.” (63 FR 12218) The inclusion of any potential method of delivery of capacity requirements is an issue that is beyond the scope of any Notice of Capacity. The capacity requirement as delineated in the Final Notice of Capacity will be reimbursed by the Government as allowed for under sections 104(d) and 104(e).

Request No. 5 - Reimbursement Eligibility

Reimbursement eligibility is based on section 104(e). Specifically, the “Attorney General shall review the statements submitted under subsection (d) and may, subject to the availability of appropriations, agree to reimburse a telecommunications carrier” In addition, section 109(e) of CALEA provides for promulgation of “. . . regulations necessary to effectuate timely and cost-efficient payment to telecommunications carriers” The Final Cost Recovery Rules (28 CFR Part 100) describe the costs eligible for reimbursement under section 109(e) of CALEA. Furthermore, the Final Notice of Capacity, as described in section 104, was never intended to describe reimbursement eligibility.

Request No. 6 - Distribution of Capacity

When law enforcement determines its capacity reimbursement priorities for *all* federal, state, and local law enforcement, it will review proposals of the distribution of capacity throughout a geographic service area for any carrier. Equipment identified on a carrier statement will either be reimbursed for reasonable costs associated with the deployment of capacity, and/or deemed to be in compliance based on a government determination not to reimburse a carrier for the deployment of capacity. Equipment installed or deployed after September 8, 1998, (i.e., not identified on a carrier statement) is not eligible for reimbursement.

Section V.C. of the Final Notice of Capacity states that “. . . carriers should consider solutions and approaches for accommodating the published capacity requirements in a way the maximizes cost-effectiveness.” Further, Section V.C. states

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that “[E]ach carrier’s deployment strategy must ensure that, if needed, the estimated actual and maximum capacity requirements set forth for the applicable geographic areas can be met” (63 FR 12231).

The FBI will not “negotiate” a distribution of capacity throughout a geographic service area for any carrier. The FBI will reimburse a carrier based on information included on each carrier’s statement filed within 180 days of the publication of the Final Notice of Capacity, in conjunction with priorities that encompass *all* federal, state, and local law enforcement electronic surveillance capacity requirements.

If a carrier is not eligible for reimbursement under CALEA, the carrier is expected to satisfy lawfully-authorized electronic surveillance requests of law enforcement (based on active investigations which require interception efforts) for each geographic area in which it provides service. No carrier will be expected to provide electronic surveillance capacity beyond the requirements listed in the Final Notice of Capacity. Section 108 of CALEA will apply to any carrier that cannot (subject to the provisions of CALEA) or will not assist law enforcement in effecting lawfully-authorized electronic surveillance.

Again, thank you for your letter and ongoing commitment to the implementation of CALEA.

Sincerely,

H. Michael Warren
Senior Project Manager/Chief
CALEA Implementation Section